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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents seek to defend the decision in this case under a theory that was not discussed or adopted by the court of appeals. The court of appeals did not doubt that the United States has standing in its own right to pursue the federal common law cause of action for money had and received to recover taxes unlawfully exacted from federal contractors. Instead, the court held that "compliance with state law claim filing procedures is a condition precedent" (Pet. App. 9a-10a) to recovery under this federal cause of action. The court stated that the requirements of the federal cause of action were not met in this case because available state procedures were not followed by the United States and, as a result, "there has been no showing of classic unjust enrichment that would

justify the use of a federal common law claim for money had and received" (*id.* at 14a).

The court of appeals recognized that its decision in this case conflicts with *United States* v. *Broward County*, 901 F.2d 1005 (1990), in which the Eleventh Circuit applied the established rule that the rights of the United States are not circumscribed or limited by state procedures, state statutes of limitation, or "state notions of laches" (*Board of County Comm'rs* v. *United States*, 308 U.S. 343, 349-351 (1939)). As discussed in the petition (at 8, 10-14), the holding in this case that the United States must comply with the state-law procedures applicable to state tax refund claims as a "condition precedent" (Pet. App. 10a) to invoking federal law to recover unlawfully exacted state taxes also conflicts with decisions of this Court and with decisions of several other courts of appeals.

2. Respondents do not deny that, under its own terms, the decision in this case conflicts with numerous decisions of other courts. Instead, respondents attempt to reconcile the conflicting precedent by invoking a theory that was *not* adopted by the court of appeals and has not been adopted by any other court. Respondents' novel theory is that the federal cause of action for money had and received should exist only when the government seeks to recover taxes that have been *unconstitutionally* exacted from a federal contractor and should not exist when the taxes have been exacted in violation of state law (Br. in Opp. 2-3, 9). Having constructed a distinction that no court has applied, respondents contend (Br. in Opp. 14-15) that there is no need for further review either (i) of the novel rule for which respondents contend or (ii) of the decision of the court of appeals that, by its own terms, directly conflicts with the decisions of numerous other courts.

Petitioners' novel theory and the decision of the court of appeals are equally inconsistent with precedent. It is well established that the federal cause of action for money had and received exists whether the defendant has received the government's money directly from the plaintiff or through an intermediary or other third party. See, *e.g.*, *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884); Pet. 8-9 n.3. The courts of appeals have therefore consistently held that the United States is entitled to pursue the cause of action for money had and received to recover taxes unlawfully exacted from its contractors, whether those taxes have been paid directly by the United States or have been paid in the first instance by the contractors. See, *e.g.*, *United States* v. *Broward County*, 901 F.2d at 1008; *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988); *City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir.), cert. denied, 387 U.S. 944 (1967). Respondents simply misstate the law, and ignore a large body of precedent, in contending (Br. in Opp. 8) that only the contractor, and not the government, may sue to recover taxes the burden of which falls on the United States. The decisions of the courts of appeals—including the decision in this case—are uniformly inconsistent with respondents' claim.

Nor is there any support for respondents' novel suggestion (Br. in Opp. 9) that the federal common law claim for money had and received applies only when the tax violates the Constitution and not when the tax is illegal for any other reason. The right of the United States under federal common law to recover property unlawfully taken directly from the United States or from its agents or contractors is not limited to unconstitutional state action. The United States may also invoke this federal common law remedy to recover property unlawfully taken by individuals (see, *e.g.*, *Bayne* v. *United States*, 93 U.S. 642 (1876) (private misappropriation of federal

funds)) or by state governments acting in violation of state law (see, *e.g.*, *United States* v. *Broward County*, 901 F.2d at 1008 (incorrect tax valuation of property under state law)). The remedy has never been limited to situations where the taking violates the Constitution.

3. The conflict created by the decision in this case involves a matter of substantial, recurring administrative importance. Respondents suggest (Br. in Opp. 11-12) that the United States is not prejudiced in this case—other than by losing its claim to recover unlawful taxes—because the federal contractor in this case had brought a state-law refund suit in state court and the United States could have required the contractor to pursue that action to completion. We do not agree that the United States, which must shoulder the burden of the tax, must accept the contractor's state-court refund suit as an alternative to the federal law claim for money had and received. Other than the decision in this case, we are aware of no decision that has reached that conclusion.

Moreover, as the petition recites (Pet. 14-15), the tax dispute in this case is of the ordinary variety that commonly arises under the standard federal service contract that applies to military and civilian facilities located throughout the Nation. It is apparent that confusion would reign under the decision in this case if the United States were left to the laws of the 50 States, and to the diligence of federal contractors, for enforcement of the government's claim for money had and received. By obstructing the right of the United States to litigate these tax issues, the decision of the court of appeals will cause significant uncertainty in the protection of the rights of the United States to recover taxes unlawfully exacted by the States and will multiply the instances where litigation is required to perfect the government's right to recover the large sums often at stake.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

AUGUST 1992